

Freedom of Information Act 2000 (Section 50)

Decision Notice

19 June 2008

Public Authority: Mid Suffolk District Council
Address: Council Offices
131 High Street
Needham Market
Ipswich
IP6 8DL

Summary Decision

The complainant requested the Council to release a copy of the tendering document submitted by the contractor awarded the contract to carry out the repairs, maintenance and work at Mid Suffolk Leisure Centre for compliance with the Disability Discrimination Act. The Council responded informing the complainant that it was willing to make a redacted version of the document available for his inspection. However, it advised the complainant that it was unwilling to disclose the financial details submitted by the contractor (mainly the price quoted for each task to be undertaken) as it considered this information was exempt from disclosure under section 43 of the Act. The Commissioner considered the requested information and concluded that section 43(2) of the Act is not engaged. He has therefore requested the Council to disclose the requested information within 35 days of this Notice.

The Commissioner's Role

1. The Commissioner's role is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

2. The complainant made an information request to the Council on 2 February 2006 for some specific information relating to the repairs, maintenance and work carried out at Mid Suffolk Leisure Centre ("the leisure centre") for compliance with the Disability Discrimination Act. Specifically, the complainant requested the

following in accordance with section 1 of the Act (the full text of this section of the Act and any other sections or exemptions referred to later in this Notice can be found in the Legal Annex section at the end of this Notice):

“a copy of the costings, schedule of works and Access Audit Information...I would also like to be provided with a copy of the “much larger contract for Council works”...”

3. The Council responded on 1 March 2006. It stated that the main contract with the contractor instructed to carry out the works is held by Norfolk Property Services and that this includes financial information. Concerning the financial information contained in the contract, it advised the complainant that it was of the view that this should be withheld under section 43 of the Act. However, the Council explained that it does hold a redacted version of the contract, that is, without the financial information supplied by the contractor. It confirmed that this document provides the schedule of works to be carried out and it was willing to make this version available to the complainant for inspection. The Council also informed the complainant that it was willing to make the Access Audit document available for inspection.
4. The complainant approached the Commissioner on 15 July 2006 to request that this matter be given formal consideration.
5. As the complainant had not exhausted the Council’s internal complaints procedure, the Commissioner wrote to him on 31 July 2006 to request that he first asks the Council to carry out an internal review of his complaint.
6. The complainant responded on 3 August 2006 providing copies of further correspondence with the Council to illustrate that he had in fact requested an internal review from the Council and received a response. He provided a copy of a letter dated 8 March 2006, in which he requested the Council to review its decision. As the complainant received no response, he wrote a further letter to the Council on 13 May 2006 chasing a reply. The Council finally responded on 28 June 2006 informing the complainant that it remained of the view that the entire copy of the tender document, containing the financial information submitted by the contractor, was exempt from disclosure under section 43 of the Act.
7. On receipt of this correspondence the Commissioner wrote to the complainant on 26 August 2006 to advise him that his complaint would now be given formal consideration.

The Investigation

Scope of the case

8. The Commissioner’s investigation has sought to establish whether the Council has complied with section 1 of the Act in this case and, in particular, whether it was correct to withhold the requested information under section 43(2) of the Act.

9. The Commissioner understands that the complainant inspected a redacted version of the tender document, which contained a breakdown of work to be completed task by task. The Council also released to the complainant the total amount of the winning tender submitted by the contractor. However, the Council refused to disclose the financial details contained in this document. The Commissioner notes that these details are mainly the individual price quoted per task and the total price for each section of the contract. It is this information which the Commissioner will be considering in this Notice.

Chronology of the case

10. The Commissioner wrote to the Council on 1 August 2007 to request a copy of the withheld information.
11. The Council responded on 15 October 2007 forwarding a copy of the tender document, including the financial details withheld from the complainant.
12. The Commissioner contacted the Council by telephone on 3 December 2007 to clarify exactly which sections of the contract had been withheld from the complainant. As stated above in paragraph 9, it confirmed that the complainant had inspected the entire document with the exception of any financial details quoted throughout the contract, for example the prices quoted for each task and the cost per section of the contract.
13. The Commissioner also sought to establish the circumstances at the time of the complainant's request and at what stage the works, maintenance and repairs on the leisure centre were. The Council confirmed that the complainant's request was made some 18 months after the contract had been awarded, and at a time when the majority of the work had been completed by the contractor at the leisure centre.
14. Having considered the sections of the tender document being withheld, the Commissioner wrote to the Council on 6 December 2007 to request a more detailed explanation concerning its application of section 43 of the Act. The Council responded on 14 January 2008. It explained in more detail why it considered the disclosure of the requested information would be likely to prejudice the commercial interests of the contractor concerned and the Council.
15. The Commissioner considered the arguments presented by the Council. He noted that the majority of arguments presented by the Council concerned the likely prejudice to the contractor commissioned to undertake the works if the information were disclosed. As it appeared that these arguments did not originate from the contractor itself and seemed to be the Council's own view on the impact of disclosure, the Commissioner wrote to the Council on 25 February 2008 to request some additional information. In line with the Information Tribunal's decision in the case of *Derry City Council v Information Commissioner (EA/2006/0014)* (which will be addressed in more detail later in this Notice), the Commissioner requested the Council to supply evidence or more convincing arguments to demonstrate that the concerns it had previously submitted

concerning the likely prejudice to the contractor originated from or were at least the genuine concerns of the contractor itself.

16. The Council responded further on 2 and 6 May 2008. It stated that it remained of the view that the requested information should be withheld, outlining further why it felt disclosure would be likely to prejudice the contractor's commercial interests. Concerning the Commissioner's request to supply evidence or more convincing arguments to demonstrate that the representations are the genuine concerns of the contractor, the Council stated that it did not feel it was appropriate to contact the contractor at this stage due to reasons outside the scope of the complainant's request. It referred to very early discussions it held with the contractor when the complainant's request was first received. It explained that the contractor was unhappy for any detailed information to be supplied to the complainant concerning the prices it quoted for the work. However, the council did not elaborate on why the contractor was of the view.

Analysis

Procedural matters

17. Although the Council stated the specific exemption it wished to rely on in the Refusal Notice it issued on 1 March 2006, it failed to outline which of the three subsections to this exemption was being applied. (Section 43 of the Act and its three subsections are reproduced in the Legal Annex section of this Notice). The Commissioner has therefore concluded that the Council was in breach of section 17(1)(b) of the Act.

Section 43 – commercial interests

18. In order for the Commissioner to agree that section 43(2) of the Act is engaged, the Council must first demonstrate that prejudice would be likely to occur to the commercial interests of the Council and/or the contractor commissioned to undertake the works and repairs at the leisure centre and that this prejudice is real and of substance. This view is taken from the Information Tribunal hearing of *John Connor Press Associates Ltd v Information Commissioner (EA/2005/0005)* and its decision, which outlined the tribunal's interpretation of "likely to prejudice". The tribunal confirmed that:

"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".

In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote. Secondly, and once the prejudice test is satisfied, the Council then needs to apply the public interest test weighing up the arguments for and against disclosure.

19. In its submissions to the Commissioner, the Council argued that disclosure would be likely to prejudice both the commercial interests of the contractor and the

Council itself. The Commissioner will first consider the likely prejudice to the commercial interests of the contractor.

Commercial interests of the contractor

20. The Council stated that disclosure would be likely to release commercially sensitive information about the contractor and how it priced the tender into the public domain. It felt that this would possibly put the contractor concerned at a commercial disadvantage in the future when tendering for other work. It explained that disclosure would provide competitors with a good indication of how the contractor prices a tender and knowledge of its detailed rates, as quoted for each task of the work. The Council felt that such knowledge could possibly be used against the contractor in future bids and put other contractors in the industry at a competitive edge. It also confirmed that the detailed rates per task were confidential to the contractor concerned.
21. It is the Commissioner's view that third parties entering into business or contracts with a public authority should be aware that it is subject to the provisions of the Act; therefore open to public scrutiny and must be accountable particularly where public funds are involved. He may accept that disclosure during the tendering process could possibly lead to prejudice, as at this time no final decision has been made about which contractor to award the contract to. However, he notes that this was not the case at the time of the complainant's request. The Council confirmed that all tenders were received by 6 August 2004 and the contract was awarded on 25 August 2004. The complainant's request was made some 18 months later and at a time when the majority of the work had been completed by the contractor at the leisure centre.
22. In the Information Tribunal hearing of *Derry City Council v The Information Commissioner (EA/2006/0014)* (previously referred to in paragraph 15) Derry City Council claimed that section 43(2) of the Act applied. It argued that releasing the requested information would prejudice the commercial interests of both itself and a third party, in this case Ryanair. It was noted at the tribunal hearing that the arguments presented by Derry City Council concerning the likely prejudice to the commercial interests of Ryanair were its own thoughts on the matter and were not the representations made to Derry City Council by Ryanair itself.
23. In this case the tribunal did not take the commercial interests of Ryanair into account in reaching its decision. It stated that:

“Although, therefore, we can imagine that an airline might well have good reasons to fear that disclosure of its commercial contracts might prejudice its commercial interests, we are not prepared to speculate whether those fears may have any justification in relation to the specific facts of this case. In the absence of any evidence on the point, therefore, we are unable to conclude that Ryanair's commercial interests would be likely to be prejudiced.”
24. The Commissioner did not interpret this decision to mean that, in every case, involving a third party the public authority must provide clear evidence that it has consulted with that third party. He accepts that the circumstances are different for

each case. However, the Commissioner did view this decision as highlighting the importance of the origin of any arguments presented relating to a third party. It may be the case that a public authority can provide evidence to indicate that a third party has been consulted. If this is not possible, it should at least be obvious that the arguments are the genuine concerns of the third party itself and not, for example, the Council's own thoughts on the matter.

25. As it appeared from the submissions received from the Council that the arguments concerning the likely prejudice to the contractor did not originate or appear to be the genuine concerns of the contractor, the Commissioner referred the Council to the relevance of this tribunal hearing. The Commissioner asked the Council to supply evidence or more convincing arguments to demonstrate that the concerns raised are the genuine concerns of the contractor.
26. Although the Council referred to very early discussions with the contractor at the time of the complainant's request and its preference for non specific financial details being released, it failed to provide the evidence or more convincing arguments to demonstrate that the above arguments were submitted or indeed originated from the contractor itself. The Council in fact stated that it did not feel it was appropriate at this stage to contact the contractor concerned to obtain such arguments for reasons it was unwilling to explain.
27. As all evidence suggests that the representations presented concerning the likely prejudice to the contractor concerned originated from the Council itself, the Commissioner has paid minimal heed to these arguments when considering whether section 43(2) of the Act is engaged in line with the tribunal hearing outlined in paragraphs 21 and 22 above.
28. The Commissioner will now consider the Council's submissions that disclosure would be likely to prejudice its own commercial interests.

Commercial interests of the Council

29. The Council confirmed that it was of the view that disclosure of the requested information would be likely to prevent it from obtaining the best possible price for future work or projects. It stated that disclosure would set a precedent opening up all tender documents to detailed public inspection. It believes this could then change the pattern of tendering which could possibly lead to the Council not achieving best price for future tenders. The Council argued that this was not beneficial to the Council or its taxpayers. It also stated that the detailed rates are confidential to the contractor and disclosure would be breaking that level of confidentiality. If information of this nature became readily available, it would be likely to deter other contractors from working with the Council. It argued that if this were to occur, it would be likely to hinder the Council's ability to obtain a competitive price for future work or projects, putting the Council at a commercial disadvantage.
30. The Council also argued that it may revisit the works carried out at the leisure centre in the future, as it was unable to complete all the work and amendments necessary with this contractor due to the overall cost of the project. It stated that if

the requested information was in the public domain and it was in a position to carry out further work at the leisure centre, future tenders could look at this information and just add inflation to the price that was initially quoted as opposed to working out its own costs. Such action would be likely to hinder any future tendering process and possibly lead future contractors to act in a dishonest manner when submitting their breakdown of costs.

31. The Commissioner does not accept that disclosure would be likely to lead to changes in the tendering process or possibly lead to the Council not achieving best value for money. As already stated above, in this case the tendering process had ended some eighteen months previously and the contract awarded to the most appropriate bidder. He also does not accept that disclosure would be likely to deter third parties entering into business with public authorities. Work or projects placed for tendering by public authorities can be a lucrative business or source of revenue for private firms. He therefore does not accept that disclosure of a particular bid, detailing the price quoted for each task, would be likely to deter such firms from bidding. No project or tender for work is the same; the tasks involved would differ from contract to contract and different factors would be taken into account in calculating the price of the work. The requested information if it were disclosed would not release any information concerning the contractor's profit margin for each task or indeed provide any indication of the overall profit to be realised by the contractor.
32. Similarly, the Commissioner does not accept that disclosure would be likely to hinder any future negotiations with a contractor concerning the remaining work that is required at the leisure centre. Firstly, the Council has provided no indication of when or how likely it is that further work will be undertaken at the leisure centre. Secondly, it is the Commissioner's view that the prices quoted for particular jobs are likely to change over time, particularly after a period of almost four years. As time goes on it becomes less and less likely that disclosure would be releasing any information concerning the contractor's current rates.
33. For the reasons explained above, the Commissioner has concluded that section 43(2) of the Act is not engaged. As the exemption does not apply, there is no need for the Commissioner to consider the public interest test.

The Decision

34. As outlined in paragraph 17 above, the Commissioner has found that the Council was in breach of section 17(1)(b) of the Act in this case.
35. The Commissioner has concluded that the Council did not deal with the complainant's request in accordance with section 1(1)(b) of the Act. This is because the Council incorrectly relied on section 43(2) of the Act and therefore failed to communicate the requested information to the complainant.

Steps Required

36. In view of the matters referred to above the Commissioner gives notice that in exercise of its powers under section 50 he requires the Council to disclose the following information to the complainant within 35 days of the receipt of this Notice:
- an entire copy of the tendering document submitted by the contractor concerned, including all financial information supplied by the contractor concerning the cost of carrying out the necessary work.

Other matters

37. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. Concerning the complainant's request for an internal review, the Commissioner notes that the Council took several months to respond. The complainant's request was made on 8 March 2006. However, the Council did not respond until 28 June 2006; some months later.
38. There is no timescale laid down in the Act for a public authority to complete an internal review but the Commissioner has since issued guidance which recommends 20 working days from the date of request as a reasonable time for completing an internal review and (in exceptional circumstances) no later than 40 working days. Also, Part VI of the Code of Practice issued under section 45 of the Act states in this regard:
- "41. In all cases, complaints should be acknowledged promptly and the complainant should be informed of an authority's target date for determining the complaint. Where it is apparent that determination of the complaint will take longer than the target time (for example because of the complexity of the particular case), the authority should inform the complainant and explain the reason for the delay."*
39. The Commissioner notes that, in failing to advise the complainant of the estimated date for completion of the internal review and in failing to complete the internal review within a reasonable timescale the Council failed to conform to Part VI of the section 45 Code of Practice.
40. The Commissioner would like to draw the Council's attention to the unacceptable delays throughout this investigation in providing additional information or further explanations to the Commissioner. Although reasonable timeframes have been given and in some cases several further extensions, the Council repeatedly failed to provide the additional information in a timely manner. The Commissioner would therefore like to remind the Council of its obligations under the Act and the level of co-operation required during such investigations. The Council should also familiarise itself with the Codes of Practice associated with the Act and the Commissioner's guidance available on his website at www.ico.gov.uk.

Right of Appeal

41. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 19th day of June 2008

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act (2000)

Section 1 -

(1) Provides that “any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 17 -

(1) Provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 43 –

(1) Provides that –

“Information is exempt information if it constitutes a trade secret.”

(2) Provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

(3) Provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”